

Worker non-compete clauses and other restraints

Submission by Associate Professor Alysia Blackham, Melbourne Law School, University of Melbourne to the Competition Review, The Treasury

I write this submission as an expert in equality and labour law at Melbourne Law School. I hold a PhD in Law from Gonville and Caius College at the University of Cambridge, as well as an LLB with first class honours from Melbourne Law School. I have taught labour law, equality law, equity and tort at Melbourne Law School, the University of Cambridge and the University of Sydney.

Contractual non-compete clauses can significantly reduce worker mobility. Non-compete clauses are only enforceable to the extent they are ‘reasonable’ – in extent and duration – to protect employers’ legitimate interests.¹ However, it can be difficult for workers (and employers) to determine what is ‘reasonable’ and when a clause is not enforceable, or only enforceable to a more limited extent.² This can deter workers from pursuing other opportunities, or compel workers to remain in jobs when they might otherwise leave. This can distort the employment relationship, increasing employers’ power, as employees may feel they cannot leave their job to seek another.

There is a risk that employers use non-compete clauses as part of a standard employment contract, rather than tailoring these clauses to particular roles or risks of competition. There is a risk, then, that non-competes will be over-inclusive in the types of jobs and roles they capture, rather than reflecting a considered view of each job role and employment context. This is supported by the ABS restraint clauses survey, which found that these clauses often apply to all workers. As found in that survey, of businesses that used non-compete clauses, the majority (68.2%) reported that these clauses applied to 76-100% of their employees.

It is arguable that a number of employers’ interests, which are protected by non-compete clauses, are already protected by other causes of action, such as equitable actions for breach of confidence (for the use or disclosure of an employer’s confidential information) or breach of fiduciary duty (for making a profit at an employer’s expense, or using an employer’s information or contacts to make a profit or in a way that creates a conflict of interest). There is arguably limited need for additional, contractual, protection via contractual non-compete clauses in many cases.

There are already many considerations which might limit job mobility; limiting non-compete clauses might remove one barrier to job mobility.

¹ *Wallis Nominees (Computing) Pty Ltd v Pickett* [2013] VSCA 24; 45 VR 657, [14].

² On the complexity and uncertainty of this test, see Andrew Fell and Elizabeth Rudz, ‘Employee Non-Compete Restraints: Resolving Uncertainty’ (2023) 46(4) *UNSW Law Journal* 1252.